

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KATHY K. GIBBS,

Plaintiff,

V.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Case No. 09-5114RJB/KLS

ORDER ADOPTING REPORT AND RECOMMENDATION

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

This matter comes before the Court on the Report and Recommendation by Magistrate Judge Karen L. Strombom (Dkt. 27). The Court has considered the relevant documents and the remainder of the file herein.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On April 28, 2004, Plaintiff Gibbs filed applications for disability insurance and supplemental security income (“SSI”) benefits. Dkt. 27, p. 1-2. She alleged disability as of December 1, 2000, due to anxiety, chronic fatigue, depression, migraine headaches, a nervous stomach, and sweating problems. Dkt. 27, p. 1-2. The Plaintiff’s applications were denied initially and on reconsideration. Dkt. 27, p. 2. On October 20, 2007, a hearing was held before an administrative law judge (“ALJ”), at which Plaintiff, represented by counsel, appeared and testified, as did a vocational expert. *Id.* On January 24, 2008, the ALJ issued a decision, determining that Plaintiff was not disabled. On January 9, 2009, Plaintiff’s request for review

1 was denied by the Appeals Council, making the ALJ's decision the Commissioner's final
2 decision. *Id.*

3 On March 4, 2009, Plaintiff filed a complaint in district court seeking review of the
4 ALJ's decision. Dkt. 27, p. 2. Plaintiff argues that the ALJ's decision should be reversed and
5 remanded to the Commissioner for an award of benefits because the ALJ erred in evaluating the
6 medical evidence in the record, in assessing the Plaintiff's credibility, in evaluating the lay
7 witness evidence, in assessing the Plaintiff's residual functional capacity, and in finding that the
8 Plaintiff is capable of performing other work existing in significant numbers in the national
9 economy. Dkt. 27, p. 3.

10 On Marcy 8, 2010, Magistrate Judge Strombom issued a Report and Recommendation
11 which agreed that the ALJ erred in determining that Plaintiff was not disabled, but for reasons
12 which were different from the Plaintiff's assertions. Dkt. 27, p. 3. The Report and
13 Recommendation recommended that the ALJ's decision be reversed, and the matter remanded to
14 the Commissioner for further administrative proceedings. *Id.*

15 Magistrate Judge Strombom specifically found the following:

16 (1) the ALJ erred in evaluating Dr. Cosgrove's findings. Dkt. 27, p. 7.

17 (2) the ALJ erred in rejecting Dr. Crist's assessment of Plaintiff's mental health
18 status and erred in evaluating the opinions of medical sources in the record who
19 had mental health expertise. Dkt. 27, p. 9-10.

20 (3) the ALJ erred by not giving any reasons for failing to adopt many of the
21 mental functional limitations Drs. Kuhner and Houck found, even though he had
22 afforded their opinions great weight. Dkt. 27, p. 11.

23 (4) the ALJ did not fail to provide clear and convincing reasons for discounting
24 Plaintiff's credibility. Dkt. 27, p. 13.

25 (5) the ALJ was required to provide germane reasons for rejecting the limitations
26 related by Plaintiff's mother. Dkt. 27, p. 16.

27 (6) the ALJ erred in his assessment of Plaintiff's residual functional capacity and
28 Step Five analysis due to errors in evaluating the medical and lay witness evidence. Dkt. 27, p. 17-18.

1 The Magistrate Judge concluded by finding that the “ALJ improperly concluded plaintiff was not
 2 disabled, and should reverse the ALJ’s decision and remand [the] matter to the Commissioner for
 3 further administrative proceedings.” Dkt. 27, p. 22.

4 The Defendant objects to only one finding by the Magistrate Judge, the opinions of Drs.
 5 Kuhner and Houck. Dkt. 28, p. 2. The Defendant argues that the Magistrate Judge
 6 misinterpreted the agency form at issue, SSA-4734-F4. *Id.* The Defendant requests that, if the
 7 Court remands the case for further proceedings, the Court not include an erroneous instruction to
 8 the agency in a remand order. *Id.* Plaintiff responds by asserting that Magistrate Judge
 9 Strombom was correct in her finding and that the Report and Recommendation should be
 10 adopted in its entirety. Dkt. 30, p. 3.

II. DISCUSSION

A. Review Standard

13 The ALJ’s decision denying the disability insurance benefits will be disturbed only if that
 14 decision is not supported by substantial evidence or it is based upon legal error. *Tidwell v. Apfel*,
 15 161 F.3d 599, 600 (9th Cir. 1998). Substantial evidence is “more than a mere scintilla. It means
 16 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
 17 *Richardson v. Perales*, 4022 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *Tidwell v.*
 18 *Apfel*, 161 F.3d at 600. If the evidence admits of more than one rational interpretation, the Court
 19 must uphold the Commissioner’s decision. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

B. Evaluation of Medical Evidence Standard

21 The ALJ is responsible for determining credibility, resolving conflicts in medical
 22 testimony, and resolving any other ambiguities that might exist. *Reddick v. Chater*, 157 F.3d
 23 715, 722 (9th Cir. 1998); *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the
 24 evidence is susceptible to more than one rational interpretation, it is the ALJ’s decision that must
 25 be upheld. *Morgan v. Commissioner of the Social Security Administration*, 169 F.3d 595, 601
 26 (9th Cir. 1999); *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *Sample v. Schwiker*,
 27 694 F.2d 639, 642 (9th Cir. 1982).

28 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings

1 “must be supported by specific, cogent reasons.” *Reddick*, 157 F.3d at 725. The ALJ can do this
2 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
3 stating his interpretation thereof, and making findings.” *Id.* The ALJ also may draw inferences
4 “logically flowing from the evidence.” *Sample*, 694 F.2d at 642. Further, the Court itself may
5 draw “specific and legitimate inferences from the ALJ’s opinion.” *Magallanes v. Bowen*, 881
6 F.2d 747, 755 (9th Cir. 1989). The ALJ must only explain why “significant probative evidence
7 has been rejected.” *Vincent on Behalf of Vincent v. Heckler*, 739 F.3d 1393, 1394-95 (9th Cir.
8 1984).

9 As a general rule, more weight should be given to the opinion of a treating source than to
10 the opinion of doctors who do not treat the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
11 1995). Where the treating doctor’s opinion is not contradicted by another doctor, it may be
12 rejected only for “clear and convincing” reasons. *Id.* Additionally, “clear and convincing”
13 reasons are required to reject the treating doctor’s ultimate conclusions. *Id.* Even if the treating
14 doctor’s opinion is contradicted by another doctor, the Commissioner may not reject this opinion
15 without providing “specific and legitimate reasons” supported by substantial evidence in the
16 record. *Id.* However, the ALJ need not accept a treating physician’s opinion which is brief and
17 conclusory in form with little in the way of clinical findings to support its conclusion. *Batson v.*
18 *Commissioner of Social Security Administration*, 359 F.3d 1190, 1195 (9th Cir. 2004);
19 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). A non-examining physician’s opinion
20 may constitute substantial evidence if “it is consistent with other independent evidence in the
21 record.” *Lester*, 81 F.3d at 830-31.

22 **C. Analysis**

23 The Report and Recommendation found that the ALJ erred by not giving reasons for
24 failing to adopt many of the mental functional limitations Drs. Kuhner and Houck found, even
25 though the ALJ had afforded their opinions great weight. The Magistrate Judge specifically
26 stated that the ALJ’s assessment of Plaintiff’s mental residual functional capacity fails to
27 adequately account for a number of the moderate limitations Drs. Kuhner and Houck found.
28 Dkt. 27, p. 11.

1 Defendant asserts that the mental residual functional form, SSA-4734-F4, completed by
2 Drs. Kuhner and Houck were correctly completed in accordance with the instructions printed on
3 the form, and that the ALJ correctly interpreted the form. Dkt. 28, p. 2-3. The Defendant states
4 that the ALJ relied on the opinions of Drs. Kuhner and Houck in resolving medical evidence, and
5 that the ALJ incorporated the opinions written in the “Functional Capacity Assessment” section
6 for the form, also referred to as the narrative section in this order, into his residual functional
7 capacity finding. Dkt. 28, p. 3. Thus, the Defendant argues, the ALJ interpreted the form
8 consistent with the instructions printed on the form. *Id.*

9 Defendant also argues that the Report and Recommendation would require that the ALJ
10 adopt the moderate limitations identified in the “Summary Conclusions” section, which would be
11 a misinterpretation of the form. Dkt. 28, p. 4.

12 Plaintiff contends that the Report and Recommendation is correct and that the Defendant
13 has failed to show how the narrative portion of the report incorporated each of the ten
14 “moderate” limitations. Dkt. 30, p. 3.

15 The Defendant’s argument is not persuasive. First, the Report and Recommendation
16 does not require the ALJ to “adopt” the moderate limitations identified in the “Summary
17 Conclusions” section. The Report and Recommendation states the ALJ’s “assessment fails to
18 adequately account for a number of moderate limitations Dr. Kuhner and Dr. Houck found.”
19 Dkt. 27, p. 11. The Report and Recommendation only requires that the moderate limitations be
20 addressed by the ALJ, which was not done in this case. It does not require that the ALJ “adopt”
21 or “incorporate” the Summary Conclusions section into his findings.

22 Second, the Report and Recommendation does not misinterpret the form. The narrative
23 section instructions explicitly states, “Explain your summary conclusions in narrative form.” Tr.
24 195. The two sections, the “summary conclusions” and “functional capacity assessment” or
25 narrative section, are inextricably linked. Drs. Kuhner and Houck failed to adequately explain
26 the summary conclusions in the narrative section of the form. Therefore, it would have been
27 error for the ALJ to adopt the statements in the narrative section of the form without explanation,
28 when the narrative section did not explain the summary conclusions. The ALJ need not adopt

1 the summary conclusions as findings, but the ALJ should have, at the least, explained the
2 deficiencies in the narrative section in relation to the summary conclusions.

3 For the foregoing reasons, the ALJ did err in explaining why he did not adopt many of
4 the moderate limitations in Drs. Kuhner and Houck's report. The Report and Recommendation
5 should be adopted, and the matter reversed and remanded to the Commissioner for further
6 administrative proceedings.

7 **III. ORDER**

8 The Court does hereby find and ORDER:

- 9 (1) The Report and Recommendation (Dkt. 27) is **ADOPTED**;
- 10 (2) The ALJ erred in his decision as described in the Report and Recommendation;
- 11 (3) The matter is therefore **REVERSED** and **REMANDED** to the Commissioner for
12 further administrative proceedings; and
- 13 (4) The Clerk is directed to send copies of this Order all counsel of record, any party
14 appearing *pro se* at said party's last known address, and Magistrate Judge Strombom.

15 DATED this 6th day of April, 2010.

16 
17 Robert J. Bryan

18 United States District Judge